

CRS Report for Congress

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The Office of Federal Contract Compliance Programs and E.O. 11246

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Summary

The Office of Federal Contract Compliance Programs (OFCCP) is an enforcement agency within the U.S. Department of Labor. In addition to other equal employment measures, the OFCCP oversees E.O. 11246, which prohibits discrimination in covered employers' workplaces on the basis of race, color, religion, national origin, and gender. The Johnson-era order further requires certain federal contractors and subcontractors to carry out affirmative actions to ensure that protected classes of workers have equal employment opportunities. After decades without substantive change, the Clinton Administration conducted a comprehensive review and issued revised regulations in August 1997 and November 2000. While women's and civil rights groups largely supported the changes, others particularly objected to the mandatory Equal Opportunity Survey. Despite some concern about the seeming delay by the Bush Administration in mailing out the annual survey, it was sent in December 2002 to 10,000 contractors. At the same time, OFCCP hired a consulting firm to assess the survey's usefulness. This report will be updated when activity warrants.

The OFCCP's Mandate

The U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) enforces E.O. 11246, Section 503 of the Rehabilitation Act of 1973 and Section 402 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974. The amended order and statutes prohibit covered employers from discriminating against job applicants or employees based on race, color, religion, national origin, gender, disability and veteran status. They further require some covered employers to take positive steps (i.e., affirmative actions such as outreach, recruitment, or training) to ensure individuals have equal opportunities for employment.

The antidiscrimination provision of E.O. 11246 applies to federal contractors and subcontractors as well as federally assisted construction contractors and subcontractors who conduct business with the government worth more than \$10,000 in 1 year. In light of the temporary nature of the construction industry's workforce, the OFCCP establishes

the affirmative actions that approximately 100,000 construction establishments must make in an effort to achieve agency-set placement goals for the protected classes.

Nonconstruction (service and supply) employers with at least one federal contract of \$50,000 or more and at least 50 employees are required to develop written affirmative action programs (AAPs).¹ The employer must analyze the use of minorities and women in its workforce, by job class, compared to the general availability of qualified or trainable minorities and women. If the employer determines through this self-audit that underutilization exists, it must develop placement goals and make “good faith efforts” to achieve them. The OFCCP is not authorized to penalize contractors for failing to meet their goals.

Regulations Revised as Part of Clinton Administration’s “Equal Pay Initiative”

E.O. 11246’s regulations had not changed substantively for decades until August 1997, when the first of two final rules was issued based on a comprehensive review by the Clinton Administration. The revised regulations cover nonconstruction contractors and relate to such matters as employer record retention (2 years if the employer has 150 or more employees or a contract of at least \$150,000; otherwise, 1 year); OFCCP access to employer records maintained in computerized form; compliance monitoring (e.g., confidentiality of contractor-provided information, use of a tiered compliance evaluation process,² and raising the contract threshold for mandatory pre-award compliance evaluations from at least \$1 million to at least \$10 million); and enforcement (e.g., specifying a fixed term of at least 6 months or an indefinite period as the length of debarment).

In November 2000, a second final rule was published that focused mainly on AAPs and codified the new Equal Opportunity (EO) Survey. With regard to AAPs, the rule cuts the factors considered in the availability test for minorities and women from eight to two; allows contractors to continue using a variety of methods to identify underutilization;³

¹ The Rehabilitation Act’s antidiscrimination provision applies to employers with a federal contract or subcontract in excess of \$10,000; the Vietnam Era Veterans’ Readjustment Assistance Act’s provision, to those with a contract or subcontract of at least \$25,000. As in E.O. 11246, both laws require employers that have at least one federal contract or subcontract of \$50,000 or more and at least 50 employees to have written AAPs.

² The tiered process consists of one or more of the following: a compliance review, heretofore the “one-size-fits-all” approach; an off-site review of records, which is similar to the desk-audit phase of the compliance review; a compliance check, which is an on-site visit to review the contractor’s books and records to determine the accuracy and completeness of previously submitted information, proper maintenance of records under the executive order and/or that the contractor has developed an AAP consistent with OFCCP requirements; and a focused review.

³ A contractor uses the availability analysis to determine the presence of protected class members among persons qualified or readily qualifiable for employment for each job group in the firm’s workforce. In developing the determination, the contractor previously had to consider (but not necessarily use) each of eight factors and the factors were not the same for minorities and for women. The revised regulation provides for only two factors and they are the same for all protected class members.

eliminates some AAP elements; and requires contractors to appoint a company official with the authority to effectively implement the program. The EO Survey queries nonconstruction contractors annually about their AAP activities, personnel actions (e.g., hires and promotions), and compensation of full-time employees *aggregated* by job group and minority or gender status. At the time of its inception, the OFCCP said that it intended to use the survey's results to direct agency resources toward contractors that are most likely to be out of compliance and to effectively use the tiered compliance process. It has not been utilized for this purpose. (See the following section for more recent information specifically on the EO survey.)

Although women's and civil rights groups largely supported the revised regulations, other parties did not. The mandatory survey was particularly controversial. Comments were made about the agency's projection of the survey's hours burden on employers; definitions of terms (e.g., job applicant); and the potential for disclosure to competitors or the public under the Freedom of Information Act of contractor-provided information — especially compensation data. The final rule also codified corporate management compliance evaluations, commonly called glass ceiling reviews, whose purpose is to ascertain if protected employees are hitting artificial barriers to promotion to upper level positions. Some were concerned that the provision would allow the OFCCP to expand this type of evaluation beyond an employer's headquarters if, during its course, the agency uncovered compliance problems at other locations.

In December 1999, almost a year before the second final rule was published, the Office of Management and Budget (OMB) approved the OFCCP's proposal to require contractors to provide *summary* compensation information at an earlier phase of routine compliance evaluations (i.e., at the opening, desk-audit stage). The agency, in December 1998, had proposed that contractors who were selected for reviews supply salary data for *individual* employees, which generated much opposition from the business community primarily due to confidentiality concerns. The OFCCP said early submission of compensation data would enable contract compliance officers to conduct more thorough initial checks and thereby more efficiently focus on specific problems. In mid-February 1999, after reviewing comments on the revised compliance evaluation scheduling letter, the agency asked OMB to grant a 90-day extension of the status quo in order to address Paperwork Reduction Act issues (e.g., burden and confidentiality). The OFCCP and OMB began circulating a draft of the EO Survey in September 1999, which reportedly was then being developed as an alternative to the agency's attempt to require detailed compensation data from contractors early in the compliance process.

These OFCCP compensation initiatives were part of the Clinton Administration's heightened efforts to narrow the gender wage gap. Other elements of the "Equal Pay Initiative" did not come to fruition (e.g., \$10 million in the FY2001 budget request for the Equal Employment Opportunity Commission (EEOC) to provide outreach — training and technical assistance — to employers, carry out a public service campaign about pay issues, and conduct training on the Equal Pay Act for some 1,000 EEOC employees).

More on the EO Survey

The final rule (41 CFR Part 60, Subpart B, Section 2.18) specifies that “[e]ach year, OFCCP will designate a substantial portion of all nonconstruction establishments to prepare and file an Equal Opportunity Survey.” The “data elements” elicited through the survey can be changed if “the following circumstances exist”:

- (1) The Secretary must clearly demonstrate through statistical analyses of EO Survey submissions that the data element in question is no longer of value; and
- (2) The Secretary must follow Notice and Comment procedures.

Women’s advocacy groups and some Members of Congress expressed concern that the Bush Administration had not sent out the EO Survey by spring 2001, because the completion date for the two prior survey rounds was May 31.⁴ Just as the precise format of the survey is not included in the final rule, however, neither is the meaning of “year” (e.g., fiscal, calendar, any 12-month period).

Beginning on December 3, 2002, the OFCCP mailed the unchanged survey. It went to 10,000 randomly selected contractors, the number Abt Associates “needs to assess the Survey’s reliability for finding employers that discriminate against their employees.”⁵ This compares favorably with the 7,000 contractors to whom the survey initially was sent in April 2000; however, the agency said at that time that it expected to eventually query about one-half of the nonconstruction contractor population.⁶ When the survey was sent in late December 2000, it went to 49,000 contractors.

An evaluation. Early in 2002, the OFCCP began an internal evaluation of the December 2000 survey. It also met with federal contractor and civil rights groups concerning the survey.⁷

In December 2002, when the latest survey was sent out, the agency hired Abt Associates “to study and improve the Equal Opportunity Survey...as a method for identifying contractor establishments likely to have discrimination problems.”⁸ In January 2003, the OFCCP also requested a 2-year extension of Paperwork Reduction Act

⁴ The April 2000 survey had to be completed and returned within 30 days. The December 30 survey initially had a 45-day completion period from date of survey receipt, but in response to contractors’ requests for extensions, the Bush Administration lengthened the completion period to May 31.

⁵ Department of Labor, Employment Standards Administration, “Proposed Collection; Comment Request,” 65 *Federal Register* 4797, Jan. 30, 2003. (Hereafter cited as 65 *Federal Register* 4797.)

⁶ In its analysis of comments received about the notice of proposed rule making, the OFCCP said it interpreted the rule’s language of “a substantial portion” to mean one-half.

⁷ “OFCCP will Mail 10,000 Pay Surveys to Federal Contractors; Outside Review Set,” *Daily Labor Report*, Dec. 4, 2002.

⁸ For more information see frequently asked questions at [<http://www.dol.gov/ofccp>].

authorization for the survey, which would involve 10,000 contractors annually, in order for the evaluation to be completed. The study is not expected to be completed until 2004.⁹

As part of the evaluation, the agency has randomly selected 2,000 contractors for reviews by OFCCP compliance officers out of the 10,000 contractors that took part in the December 2002 survey. Abt Associates will compare the results of the compliance reviews with the survey responses of the contractors to determine “if there is any kind of correlation” between the two. According to OFCCP Director Charles James, “Abt will be able to tell us with a firm statistical basis whether the survey works and whether it can be relied on” to suggest which contractors engage in employment discrimination.¹⁰ As noted at the outset of this section, the regulation requires the use of “*statistical analyses* of EO Survey submissions” in order to invalidate a data element currently part of the survey.

⁹ 65 *Federal Register* 4797.

¹⁰ “OFCCP Schedules 2,000 Compliance Reviews to Analyze Controversial Pay Survey’s Validity,” *Daily Labor Report*, June 12, 2003.